Ethyl Products Company, Specialty Packaging Products Division, Subsidiary of Ethyl Corporation *and* Local 238, International Union of Electrical, Radio and Machine Workers, AFL-CIO. Case 39-CA-1323

16 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND DENNIS

On 30 August 1978 Administrative Law Judge Thomas T. Trunkes issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] No party filed exceptions to the judge's refusal to defer the unfair labor practice allegations to the contractual grievance and arbitration procedure. We note that the Board, in *United Technologies Corp.*, 268 NLRB 557 (1984) (Member Zimmerman dissenting), overruled *General American Transportation Corp.*, 228 NLRB 808 (1977), on which the judge relied in declining to defer.

In fn. 14 of his decision, the judge erroneously stated that our decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), is inapplicable because the General Counsel failed to make out a prima facie case of unlawful conduct. The two-pronged causation test set forth in *Wright Line* applies to "all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation." Id. at 1089.

DECISION

STATEMENT OF THE CASE

THOMAS T. TRUNKES, Administrative Law Judge. This proceeding was heard in Hartford, Connecticut, on May 2 and 3, 1983, based on a charge filed on September 16, 1982,[1] amended on October 13, and again on November 22, by Local 238, International Union of Electrical, Radio and Machine Workers, AFL-CIO (the Union) and a complaint and notice of hearing issued thereon on December 29, pursuant to Section 10(b) of the National Labor Relations Act (the Act) which alleges that Ethyl Products Company, Specialty Packaging Products Division, Subsidiary of Ethyl Corporation[2] (Respondent) violated Section 8(a)(3) and (1) of the Act by threatening employees with demotion and denial of overtime for engaging in union activities, by carrying out said threats, and by issuing warnings and a suspension against its employee Margretta Herskowitz.

All parties were represented at, and participated in, the hearing and had full opportunity to adduce evidence, to examine and cross-examine witnesses, to file briefs, and to argue orally. All parties waived oral argument, and the General Counsel and Respondent filed briefs.[3]

On the entire record in this case, including my observation of the demeanor of witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that Respondent, a Virginia corporation, with an office and place of business located in Bridgeport, Connecticut, herein the Bridgeport facility, is engaged in the manufacture and distribution of plastic and metal dispenser products. During the 12-month period ending June 30, Respondent purchased and received at its Bridgeport facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Connecticut. Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Operations*

Respondent manufactures spray pumps used in the pharmaceutical industry at its Bridgeport facility. The products are assembled by automated machinery after which they are inspected by employees. Following a second inspection, the product is shipped out. Approximately 125 employees are hourly employees covered by a collective-bargaining agreement with the Union. The

[1] Unless indicated otherwise, all dates hereafter shall refer to the year 1982.

[2] The correct name of Respondent was amended at the hearing by stipulation of the parties.

[3] Respondent, simultaneously with submitting its brief, made a "Motion to Correct Transcript," referring to 21 typographical errors found in the transcript. Having received no objection to the motion by either Charging Party or the General Counsel, I grant the motion to correct transcript, as moved by Respondent.

parties stipulated that the following individuals were supervisors within the meaning of Section 2(13) of the Act during certain periods of 1982: Tom D'Alessandro, acting quality control manager between April 15 and June 11; Don Wolf, quality control manager between June 11 and November 15; Peter Mila, employee relations supervisor, 1982; and Kevin Edwards, plant manager, 1982[4]

The facility operated three shifts as follows: First shift from 7 a.m. to 3 p.m.; second shift from 3 p.m. to 11 p.m.; and the third shift from 11 p.m. to 7 a.m. At the beginning of 1982, there were 5 quality control group leaders on the first shift, supervising an average of 10 or 11 employees; on the second shift there was 1 group leader supervising approximately 20 to 25 employees; and on the third shift there were 2 group leaders, supervising approximately 4 to 5 employees each. All the group leaders are included in the bargaining unit.

B. *Union Status*

For many years, Respondent has recognized the Union as the exclusive collective-bargaining representative for all its production and maintenance employees at its Bridgeport facility. The latest collective-bargaining agreement is effective from September 14, 1981, to August 11, 1984.

Margretta Herskowitz, the alleged discriminatee, has been employed by Respondent since January 1967. Her current position is that of quality control inspector. In 1976 she became a temporary group leader for 3 weeks. In May 1977 she became a temporary group leader until October 1977. In May 1980 she became the permanent group leader on the third shift. On June 14, 1982, she was demoted from her permanent group leader position to that of quality control inspector, her present position.

Herskowitz has been actively engaged in union business. In November 1973, Herskowitz became chief steward of the Union on a temporary basis. In April 1974, she was elected president of the Union. After her term expired in 1977, she again became a steward. In May 1980, Herskowitz again was elected president of the Union, and currently holds that position.

Article VI of the collective-bargaining agreement, entitled "Grievance and Arbitration" describes the procedures followed from the initiation of a grievance to its conclusion. Article VIII of the same agreement describes the union representation to which each grieving employee is entitled, as well as the rights and duties of union stewards and other union officials in the investigation and handling of all grievances.

The record indicates that the last strike at the Bridgeport facility occurred in 1972. Since that date approximately 250 to 300 grievances have been filed by union representatives, of which two have been arbitrated. According to Peter Mila, employee relations supervisor, Respondent, and the Union have had a good working relationship over the last 3 years. Kevin Edwards, plant manager, testified that Respondent always had "a very good relationship in terms of resolving disputes between the Union and the Company." Herskowitz concedes that she always has maintained a good relationship with Edwards.

C. *Events Prior to June 9*

In January, Kevin Edwards was appointed plant manager of the Bridgeport facility. On assuming this position, he undertook a study with the object of cutting down costs. He conducted a meeting with his supervisory staff in January and outlined his plan, which included elimination of several jobs at the plant, encompassing both unit and nonunit positions. This included the elimination of certain quality control group leaders, a position held by Herskowitz at the time.

On April 19, Tom D'Alessandro was appointed acting quality control manager. According to Herskowitz, immediately thereafter she began to have problems with him. She testified that prior to April, although she knew D'Alessandro, she did not have any business relationship with him and found him "very pleasant." Within a day or two of his appointment, Herskowitz experienced her first unpleasant encounter with D'Alessandro. Herskowitz stated to him that she needed a magnet for her work. When he questioned this need, an exchange of words was held, during which time he allegedly stated, "You're not fooling me, you may have everybody else in this place fooled, but you're not fooling me," offering no explanation for that statement. He further accused Herskowitz of spending 15 minutes in the ladies' room, which was denied by her. A second incident involving D'Alessandro and Herskowitz occurred in May. D'Alessandro informed Herskowitz that he had received a complaint that Herskowitz had telephoned one of the foremen of the plant at his home and "bothered" him and his wife. When Herskowitz denied the accusation, D'Alessandro stated that someone had been lying and he was going to investigage the matter. Nothing further came of this incident. Throughout May, Herskowitz continued to have problems with D'Alessandro at the facility. Although D'Alessandro was critical of the work performance of Herskowitz, she was not disciplined in any manner. Finally on June 1, D'Alessandro issued a verbal written warning[5] in which D'Alessandro accused Herskowitz of telephoning an employee at 2 a.m. to discuss some work related problem. Herskowitz denied the accusation. Thereafter on June 3, Herskowitz filed three separate grievances, complaining about D'Alessandro's conduct towards her. One of the grievances related to her telephoning of the employee at 2 a.m. on May 25.

On June 8, at a meeting of the managerial staff, at which meeting D'Alessandro was not present, Edwards decided to eliminate the first- and third-shift quality control group leader positions, which included the position held at the time by Herskowitz. The elimination was to take effect on June 14.

[4] The General Counsel contends that D'Alessandro continued in a supervisory status after June 11. Respondent denies this was so.

[5] Although in writing, this "verbal writen warning" did not constitute a formal written warning as defined in the collective-bargaining agreement.

D. *Events of June 9*

According to Herskowitz, as she was finishing her shift at approximately 7 a.m. on June 9, and was talking to D'Alessandro, she was informed by a fellow employee that an additional inspector was needed for the first shift. She told D'Alessandro, if necessary, she would work overtime. He responded, "Don't you tell me who's going to stay over, that's my job, not yours." He then asked another employee, Liz Caple, if she would work overtime. At first Caple agreed to do so, but then stated that she could not as she had "riders."[6] D'Alessandro then told Caple that after she arrived home, she should call Foreman Mary Aguire to check whether she was needed. Approximately 9:20 a.m., Aguire telephoned Herskowitz, informing her that she was not needed. However, Aguire asked Herskowitz if she could come to work on the second shift. Herskowitz agreed to this request. Approximately 2:45 p.m.,[7] Aguire again telephoned Herskowitz, informing her that she was not needed that day. When Herskowitz reported to work later that evening as scheduled, Joe Loschiavo, the foreman of the second shift, informed her that D'Alessandro had shut down the machines during his shift. She further asserted that the machines were running on her shift that day.

According to D'Alessandro, he arrived at work on the morning of June 9 at approximately 6:40 a.m. Herskowitz informed him that someone was needed and that it was her turn to work overtime. He responded that inasmuch as Foreman Aguire was not there, and she kept overtime records, he was unsure whose turn it was to work. When Herskowitz insisted that it was her turn to work, he told her to go home. He then asked inspector Caple that if it was her turn to work would she do so as someone was needed. Caple told him to call her if he needed her. D'Alessandro asserted that neither Caple nor Herskowitz did work overtime that day.

Meanwhile, Peter Mila, employee relations supervisor, prepared to implement Respondent's decision to eliminate the first- and third-shift group leader positions. On the afternoon of June 9, Mila informed D'Alessandro that both Herskowitz and Helen Brown, a group leader on the first shift, were going to have their positions eliminated. Mila prepared a letter addressed to Heskowitz which he gave to Loschiavo, the second-shift supervisor, who, in turn, handed it to Herskowitz at the beginning of her shift at approximately 11 p.m.

E. *Events of June 10*

On June 10, at 3 a.m., during Herskowitz' lunchbreak, she wrote out grievances with respect to her demotion and her denial of overtime on June 9. At 7 a.m., at the conclusion of her regular shift, accompanied by steward Jim Hall, she confronted D'Alessandro and inquired why her group leader position was eliminated. According to both Herskowitz and Hall, D'Alessandro replied that Respondent did not need any group leaders that did union business.

Herskowitz continued working during the morning on overtime. Later that morning, according to Herskowitz, she asked permission of Supervisor Aguire to see Mila to file the grievances that she had completed earlier that morning. Upon completing her business with Mila, she went to the cafeteria where she was instructed by D'Alessandro to go home. When she protested, claiming that Aguire told her she was to work until 3 p.m., he responded that he did not care as "you're not supposed to be doing union business while you're working."

Herskowitz then asked Mila, who had also gone to the cafeteria after completing his business with Herskowitz, if he had heard what D'Alessandro had stated. His response was, "Maggie, you know, he figures you're on overtime and you're not supposed to be doing union business." Her response to that remark was, "Well, then, you'd better straighten Tom out and tell him to look at our contract because our contract calls for doing union business on the first eight hours of the shift." She then proceeded to file a grievance over this incident.

D'Alessandro's version of the incidents occurring on the morning of June 10 was somewhat different. He stated that he arrived at the plant approximately 6:40 a.m. He immediately ascertained that an inspector was needed on the 7 a.m. to 3 p.m. shift. He asked Herskowitz if she could work overtime, which she agreed to do. Later that morning, approximately 8:30 to 9 a.m., Herskowitz requested permission to see Mila. He questioned whether she could conduct union business on overtime and telephoned Mila. Mila informed him that although she was not to conduct union business on overtime, he was willing to see her. After Herskowitz left the plant area, Supervisor Aguire informed D'Alessandro that an extra inspector was not needed as certain machines were not operating. When Herskowitz returned from her business with Mila, D'Alessandro informed her that she was not needed to work anymore that day. As he walked with Herskowitz toward the timeclock, he stated to her that henceforth while she was on overtime, she was not to conduct union business unless absolutely necessary.

According to Mila, D'Alessandro telephoned him on June 10 that Herskowitz was working overtime and wanted to see him about union business. D'Alessandro inquired whether he was obliged to accommodate her while she was working overtime. Mila reviewed the collective-bargaining agreement and informed D'Alessandro that although Respondent did not have to permit her to conduct the union business while working overtime, he would see her. Thereafter, Herskowitz did see Mila to file the two grievances, discussed earlier. However, during her meeting with Mila, Herskowitz inquired whether she could "bump" another group leader on the third shift or the steward who was a group leader on the second shift. Mila did not respond to the question. After this meeting, he followed Herskowitz out of his office into the cafeteria. He heard D'Alessandro inform Herskowitz that as one of the machines was not operat-

[6] Apparently she was in a carpool and was obliged to drive home some fellow employees.

[7] Although Herskowitz stated that she received the call at 3:45 p.m., as the shift was from 3 p.m. to 11 p.m., I conclude that the call was made at 2:45 p.m.

ing, there was no work for her, and he requested her to "punch out."[8]

F. *Events of June 11*

On the morning of June 11, D'Alessandro arrived at the plant at approximately 6:40 p.m. He testified that one of the foremen on the first shift advised him that an inspector was needed. D'Alessandro then requested that Herskowitz work overtime which was accepted by her. Approximately 7:15 a.m., D'Alessandro was informed by the same first-shift foreman that an additional inspector was not needed for his shift. He related this information to Herskowitz and asked her to "punch out," which she did.

The same day, June 11, Don Wolf became the quality control manager, replacing D'Alessandro. During the next week D'Alessandro familiarized Wolf with his duties in his new position. The following week D'Alessandro continued in the employ of Respondent as a manufacturing engineer, a nonsupervisory position.

G. *Events from June 14 to June 22*

On June 14, Respondent implemented its decision to abolish the group leader positions for the first and third shifts, resulting in the demotion of Herskowitz from goup leader to inspector.[9]

On June 17, a third-step grievance meeting was conducted with respect to the overtime grievances filed by Herskowitz. The meeting was attended by Herskowitz, D'Alessandro, an international representative of the Union, and several other individuals who were either company officials or employees who held positions in the Union. Although nothing of significance resulted from this meeting, testimony by several witnesses established that there was hostility between D'Alessandro and Herskowitz. This hostility was evidenced by name calling by both D'Alessandro and Herskowitz.[10]

On June 22, Edwards and Herskowitz met in Edwards' office for the purpose of attempting to resolve some of the problems that Herskowitz was having with Respondent. As a result of this meeting, Respondent withdrew the verbal written warning issued by D'Alessandro on June 1, relating to the unauthorized telephone call to a fellow employee, and Herskowitz agreed to withdraw the three grievances filed by her on June 3.

H. *Events Between August 24 and September 1*

For the 2-month period from June 22 to August 24, peace and tranquility apparently reigned between Herskowitz and Respondent. No evidence was adduced at the hearing to indicate that any problems existed between the two antagonists during this period. However, on August 24, this armistice was broken. On that date, while Plant Manager Edwards was discussing a production problem with Foreman Stanley Nielgelski, the latter was paged to respond to a telephone call. He entered his office and was on the telephone for several minutes, when Edwards, upset over the interruption of the conversation he was having with Nielgelski, entered the foreman's office, and inquired about the telephone call. When informed by Nielgelski that it was Herskowitz calling him with respect to a personnel problem, Edwards picked up the telephone and reminded Herskowitz that any problems that she encountered as union president should be resolved with Mila, informing her that she had interrupted an important conversation he was having with Nielgelski when she made the call to Nielgelski.

On August 31, at a staff meeting in Edwards' office attended by Wolf, Mila, and Edwards, Wolf informed Edwards that Herskowitz had left an excessive amount of work to be inspected on August 30, and requested guidance as to what action, if any, should be taken. After reviewing the situation and concluding that Wolf had reason to complain, Edwards suggested that a verbal written warning be issued to Herskowitz. Mila then stated that a meeting was scheduled with Herskowitz the following day concerning an apprenticeship program, which would be an appropriate time to issue the verbal written warning to her.

The following day, September 1, Herskowitz and shop steward Hall met with Mila to discuss the apprenticeship program. Subsequently, Wolf and Nielgelski joined the meeting. Wolf informed Herskowitz that he had a complaint respecting her failure to inspect material. A heated argument thereafter occurred between Wolf and Herskowitz. Edwards, who was in the plant nearby, heard the commotion in Mila's office, and upon being asked by several employees what was occurring, entered Mila's office. He joined in the argument, siding with Wolf. While the argument was going on, Wolf asked Herskowitz what she was saying, at which point she turned to him and stated, "If you took the shit out of your ears, you could hear what I was saying."[11] Edwards thereafter demanded that Herskowitz show proper respect for management officials. After further argument, Edwards informed Mila to issue Herskowitz a warning. When Herskowitz asked for the reason for the warning, Mila informed her that the plant rules and regulations prohibited the use of objectionable language. Following this, Herskowitz left the office. Later that day, she met with Wolf and apologized for improper use of language directed toward him. During this meeting, Wolf agreed to retract the verbal written warning.[12] Wolf informed Mila that he was retracting the verbal written warning issued earlier to Herskowitz. Mila then checked with Edwards to see if he approved of the retraction. Edwards

[8] Mila gave no indication that he overheard the conversation between D'Alessandro and Herskowitz as she walked to the timeclock to punch out.

[9] The record is unclear. It was undisputed that the first shift (7 a.m. to 3 p.m.) had *five* group leaders. Yet, a reading of the record indicates that Helen Brown was the *sole* group leader on the first shift, and she was demoted along with Herskowitz. No explanation was forthcoming to clarify this apparent discrepancy.

[10] Although there is a conflict of testimony as to what was said by each of the two principals at this meeting, other than establishing the hostility between D'Alessandro and Herskowitz, I find no need to draw conclusions as to the exact words uttered by either individuals.

[11] Although Herskowitz used the word "crap" in lieu of "shit," I do not credit her.

[12] Although the verbal written warning is dated September 2, I credit the testimony of Mila that it was issued to Herskowitz on September 1.

responded that he did not approve of the retraction and ordered that the verbal written warning be reinstated. He further directed that Wolf inform Herskowitz that this would be done.

Approximately 2 hours later, while Edwards was conducting a production meeting attended by several employees, including Wolf and Nielgelski, he received a telephone call from Herskowitz who began to complain about the earlier meeting that day. Edwards informed her that she was interrupting a meeting and that she had been warned about making telephone calls to personnel other than Mila relating to union business.

I. *Events Between September 2 and 30*

On September 2, Herskowitz received two written warnings signed by Edwards. The issue of the first warning involved the alleged abusive misbehavior of Herskowitz toward Wolf during the meeting of September 1; the second warning was issued as a result of the two unauthorized telephone calls of August 24 and September 1.

Approximately 2 weeks later, Herskowitz visited Mila to review her personnel file. When she noted that the verbal written warning issued by Wolf was still in her personnel file, she informed Mila that it had not been retracted by Wolf. He responded that it had not been retracted and had instructed Wolf to so notify her, and further told Herskowitz that Wolf had told him that he had so informed her. Her reply was that she would file a grievance against Mila.

At approximately the same time, on September 16 (although dated September 8), the original charge in the instant case was filed in the Regional Office of the General Counsel.

J. *The 3-Day Suspension of Herskowitz*

On September 30, Edwards was informed by Wolf that some work that had been performed on the third shift was totally defective. Edwards ordered Wolf to run a sample check to determine the damage. Upon completion of the check, Wolf informed Edwards that the work was 60- to 80-percent defective. Edwards personally inspected the work, and thereafter determined that it would have to be completely scrapped, causing an actual loss to Respondent of approximately $3000. Edwards informed Wolf that the inspector responsible for passing the defective work would receive disciplinary action. An investigation revealed that the inspection had been done by Herskowitz. As a result, on October 1, Wolf issued a 3-day suspension to Herskowtiz.[13]

IV. DEFERRAL TO ARBITRATION

Respondent contends that the instant case should be dismissed and the parties referred to the grievance and arbitration procedure established in the collective-bargaining agreement. *Collyer Insulated Wire*, 192 NLRB 837 (1971).

Although it appears that some of the issues in the instant case could be resolved through the grievance and arbitration procedure of the collective-bargaining agreement, the Union has not chosen to go that route.

The Board made it clear in *General American Transportation Corp.*, 228 NLRB 808 (1977), that it will not defer cases alleging violations of Section 8(a)(3), et al., of the Act. Chairman Murphy, the swing vote in a 3-2 split decision, stated at 810–811:

> In cases alleging violations of Section 8(a)(5) and 8(b)(3), based on conduct assertedly in derogation of the contract, the principal issue is whether the complained-of conduct is permitted by the parties' contract. Such issues are eminently suited to the arbitral process, and resolution of the contract issue by an arbitration will, as a rule, dispose of the unfair labor practice issue. On the other hand, in cases alleging violations of Section 8(a)(1), (a)(3), (b)(1)(A), and (b)(2), although arguably also involving a contract violation, the determinative issue is not whether the conduct is permitted by the contract, but whether the conduct was unlawfully motivated or whether it otherwise interfered with, restrained, or coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act. In these situations, an arbitrator's resolution of the contract issue will not dispose of the unfair labor practice allegation. Nor is the arbitration process suited for resolving employee complaints of discrimination under Section 7.

Unless and until the Board modifies its decision in *General American*, I am obliged to follow its ruling established in said case. Accordingly, I shall not defer the instant matter to arbitration.

V. ANALYSIS AND DISCUSSION

The General Counsel contends that the various adverse actions of Respondent against Herskowitz between June and October were instituted to discourage her from her union and protected concerted activities as president of the Union.

Respondent contends that each and every adverse action resulted from various acts of misfeasance on the part of Herskowitz.

In order to demonstrate a discriminatory action, General Counsel must show, by a preponderance of the evidence, the following elements: Activity on the part of the alleged discriminatee, knowledge of said activity by Respondent, animus of Respondent, the timing of the action by Respondent as a nexus, and a lack of a valid defense to justify said action. *Scott's Wood Products*, 242 NLRB 1193, 1197 (1979).

After careful analysis and study of all the evidence submitted in the instant case, I have concluded that General Counsel has failed to establish animus on the part of Respondent toward either Herskowitz or the Union, and has also failed to refute the valid defenses presented by Respondent to justify its action in each of the specific in-

[13] In the suspension letter, Wolf further indicated that Herskowitz had improperly passed for inspection other work performed on September 22. However, it should be noted that Edwards, who ordered the disciplinary action against Herskowitz, did not consider the aspect in the action. I find that Wolf, on his own, added this alleged malfeasance of Herskowitz as a reason for the 3-day suspension.

stances alleged to be a violation. Accordingly, I shall recommend the dismissal of all the allegations of the complaint.

The theory of the General Counsel's argument rests on animus of D'Alessandro toward Herskowitz exhibited from April to June and continuing by other supervisors of Respondent to October. General Counsel argues that the animosity of D'Alessandro is evidenced by an alleged statement by him to Herskowitz on June 10 following her request for an explanation for the reason her group leader position was eliminated. According to Herskowitz, his answer was, "Because we don't need any group leaders that do union business." Although D'Alessandro did not specifically deny making this remark, he testified fully as to his version of the conversation he had with Herskowitz on that date. As I will detail below, Respondent offered a full and satisfactory rationale why Herskowitz was demoted from group leader to inspector. I find the reasoning logical and candidly explained.

Herskowitz concedes that prior to D'Alessandro's role as acting quality control manager in April, she found him to be a pleasant person as she had no previous encounters or difficulties with him. Despite this acknowledgement by Herskowitz, General Counsel argues that 2 years previously while Herskowitz was president of the Union, a complaint had been filed by a member of the Union against Respondent with the Office of Safety and Health Administration (OSHA).

According to General Counsel's theory, at that time, D'Alessandro was annoyed with the union's action, and, therefore, 2 years later, when he was afforded the opportunity, he began a campaign of discriminatory actions against Herskowitz. I find this argument untenable. It may be D'Alessandro had expressed annoyance at the action of the Union two years previously, but I cannot conclude that after such a long hiatus, coupled with the fact that Herskowitz was not responsible for the filing of the OSHA complaint, that D'Alessandro, with whom Herskowitz admits having had a pleasant relationship, would suddenly seek "revenge." (*Thatcher Glass Mfg. Co.*, 265 NLRB 321, 326 (1982)).

D'Alessandro may have been a more strict supervisor than his predecessors. In his 2-month tenure as acting quality control manager, he apparently ran a "tight ship," stepping on Herskowitz' toes as well as toes of other employees. This trait, by itself, does not prove animosity toward Herskowitz or the Union.

With respect to Respondent's defenses for its actions against Herskowitz, I find that in all cases it had reasonable cause to justify its adverse actions against her from June to October, which will be fully explored below.

A. *Threats of Demotion and Denial of Overtime*

The General Counsel alleges that about June 9 D'Alessandro threatened to demote employees and threatened to deny employees overtime if they engaged in union activities.

No evidence was adduced at the hearing to substantiate these allegations, nor did the General Counsel argue in his brief that such threats were made. Accordingly, I find that Respondent did not violate the Act, as alleged in paragraph 7 of the complaint, and recommend that these allegations be dismissed.

B. *Denial of Overtime on June 9, 10, and 11*

The General Counsel contends that the denial of overtime to Herskowitz on June 9, 10, and 11 was discriminatorily motivated because of the protected concerted activity of Herskowitz.

Article IV, section 4.04 (A) of the collective-bargaining agreement states as follows:

> Whenever practicable, employees in each classification on a shift will be given equal opportunities to work overtime as compared with employees in that classification on the same shift and within the same department, provided such employees are fully qualified to perform the work. In the event an employee does not work such overtime as is scheduled for him, the unworked time shall be counted in computing the employee's share of equitable overtime work. A department overtime chart shall be maintained and shall be made available for inspection at the employee's or Union's request.

The evidence revealed that on June 9 Herskowitz advised D'Alessandro that she was available to work overtime. Uncertain as to which employee was due to receive overtime, he rejected her offer.

On June 10, at the end of her normal shift, Herskowitz was asked by D'Alessandro to work overtime, to which she consented. After a short period, D'Alessandro determined that no overtime was necessary and sent Herskowitz home. General Counsel urges that this denial of overtime to Herskowitz, after requesting it from her, was discriminatorily motivated. This contention is unconvincing as I cannot infer that D'Alessandro would voluntarily assign overtime to someone he allegedly is discriminating against, and thereafter cancel the overtime. Had D'Alessandro desired to deny overtime to Herskowitz on that day, he simply could have said nothing to her, and later could have assigned overtime to another employee. The evidence establishes that no overtime was performed by any employee on that date.

Again on June 11, Herskowitz was asked to work overtime by D'Alessandro. D'Alessandro later was informed that the volume of work would be limited, and that it would be unnecessary to retain inspectors for overtime, as the first-shift inspectors would be capable of performing the necessary work without any assistance. As a result, Herskowitz was told to go home. Again, no overtime work was performed by any inspectors on that date.

To further support my conclusion, I note that the record revealed that in 1982 Herskowitz had been assigned more than her share of overtime.

In summary, the General Counsel has failed to sustain his burden of proof that the denial of overtime to Herskowitz by D'Alessandro resulted from a discriminatory motive on his part. Accordingly, I recommend that this allegation be dismissed.

C. *Demotion of Herskowitz on June 14*

The General Counsel bases this allegation on the alleged statement from D'Alessandro to Herskowitz on June 10 that when asked why her group leader position was eliminated, he responded, "Because we don't need any group leaders that do union business." This alleged statement was confirmed by James Hall, a shop steward for the Union.

Although D'Alessandro did not explicitly nor specifically deny the statement attributed to him, he did testify completely as to his conversation with Herskowitz on the morning of June 10. He denied having any conversation with her at a later time that date. As his conversation with Herskowitz, according to him, related solely to the overtime situation, it may be inferred that D'Alessandro denied the statement attributed to him with respect to her demotion, and I so do infer.

I credit D'Alessandro's version of the conversation with Herskowitz, rather than Herskowitz or Hall. I was not duly impressed with Herskowitz as a witness. She was verbose, admittedly confused, had mistaken dates, stated several times "I can't remember," and rambled on about inconsequential matters. Hall, the shop steward of the Union, simply concurred with her version of the conversation. I do not credit him.

On the other hand, Respondent offered a logical defense for the demotion of Herskowitz. Both Edwards and Mila credibly testified as to the sequence of events which resulted in her demotion. D'Alessandro neither was present at a meeting when the decision was made to demote the two group supervisors, nor did he have any input with respect to this demotion. Accordingly, it would have been foolhardy as well as illogical for D'Alessandro, in the presence of a union official, to tell Herskowitz that she was being demoted because of her union activity. I also note that the other group supervisor demoted with Herskowitz did not join with her in filing a charge.

I further note that the record revealed that another group supervisor had been demoted at an earlier date. Lastly, no evidence was adduced that either of the two group supervisors, demoted many months before this hearing, had been replaced by anyone else. Accordingly, for the reasons listed herein, I conclude that the General Counsel has not sustained his burden of proving the allegation, and I recommend that this allegation be dismissed.

D. *Warnings to Herskowitz on September 2*

General Counsel contends that the warnings issued to Herskowitz about September 2 was a setup to justify a 3-day suspension accorded to Herskowitz at a later date. According to the General Counsel's theory, Respondent, through other management officials, continued the harassment of Herskowitz begun by D'Alessandro in June.

With respect to the verbal written warning issued by Wolf (which I found had occurred on September 1), the record establishes that Herskowitz failed to perform her inspecting responsibilities on August 30 and that Edwards, on being notified of this by Wolf, authorized Wolf to issue a verbal written warning. Although later Wolf was willing to retract the warning, Edwards insisted that it stand. I find that Edwards was Respondent's official responsible for this verbal written warning, the same Edwards who Herskowitz concedes had a good relationship with her. I find no animus on his part, and I find a valid reason for his having issued said warning. Accordingly, I conclude that the General Counsel has not sustained his burden with respect to this allegation.

With respect to the written warning regarding unauthorized telephone calls, Edwards credibly testified that he had instructed Herskowitz not to make telephone calls concerning union business to any Respondent officials other than Mila. Although Herskowitz denied receiving these instructions from Edwards, for reasons stated earlier, I do not credit her.

Herskowitz had no legitimate basis for disobeying Edwards' instructions. Her disruption of company meetings both on August 24 and September 2, in the eyes of Edwards, warranted the written warning accorded to her. The fact that she is the union president does not exempt her from obeying plant rules promulgated by Respondent. Accordingly, I find that the General Counsel has not sustained his burden with respect to this allegation.

With respect to the second written warning of September 2 concerning insubordination of Herskowitz, the record reveals that in the original charge, dated September 16, no mention was made of this allegation. In the first amended charge, dated October 13, Herskowitz alleges a violation with respect to one verbal and two written warnings. However, in the second amended charge filed on November 22, only one verbal and one written warning issued on or about September 2 are alleged as violations. In the complaint, which was never amended, the allegation specified one written and one verbal warning. It would appear that the issuance of the second written warning, referring to the insubordinate action, is not an issue in the instant case, notwithstanding the fact that both General Counsel and Respondent made an issue of the second written warning in their briefs. Accordingly, I am constrained to conclude that the Regional Office, in issuing the instant complaint, did not consider the issuance of the second written warning on September 2 to be violative of the Act. Therefore, I shall make no finding with respect to this matter.

E. *Suspension of October 1*

General Counsel's case with respect to this allegation rests on the theory that Respondent had discriminated against Herskowitz for several months as manifested by the issuance of various warnings, the denial of overtime, and her demotion. Accordingly, the 3-day suspension of Herskowitz was the culmination of Respondent's campaign against her.

Having found that none of the prior disciplinary measures instituted by Respondent against Herskowitz is violative of the Act, I also find the suspension of Herskowitz not to be a violation within the meaning of the Act.

Here again, I reject the account of Herskowitz as to what occurred leading to her suspension. Respondent, through Edwards, credibly testified that Herskowitz had

been derelict in passing inspection on certain work which turned out to be worthless. Having ascertained that Herskowitz had been the inspector who passed the material, which resulted in a monetary loss of $3000 to Respondent, he took what he considered appropriate measures in ordering the 3-day suspension.

As the collective-bargaining agreement contains a management-rights clause which, inter alia, permits Respondent to operate its facility in an effective manner and to establish plant rules, I find that Edwards acted within his managerial rights in handing out to Herskowitz a 3-day suspension on October 1. Accordingly, I conclude that the General Counsel has not sustained his burden of proof with respect to this allegation.

In summary, insufficient evidence was adduced at the hearing to refute Respondent's position that the issuance of warnings, the denial of overtime, and the demotion and suspension of Herskowitz was unjustified. The burden of proof rests on the General Counsel to establish a prima facie case. He has failed to meet this burden.[14] Mere suspicion is no substitute for proof of an unfair labor practice. *Lasell Junior College*, 230 NLRB 1076 fn. 1 (1977). In the absence of probative evidence of union animus, and as Respondent has demonstrated justifiable reasons for its actions regarding Herskowitz, I find that General Counsel has failed to establish that Herskowitz was treated discriminatorily because of her union or protected concerted activities. Accordingly, I have concluded that Respondent did not violate the Act in any manner as alleged in the complaint, and I therefore recommend that the complaint be dismissed in its entirety.

[14] Inasmuch as I find that the General Counsel has not made out a prima facie case, *Wright Line*, 251 NLRB 1083 (1980), is inapplicable to the instant case.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The complaint is dismissed in its entirety.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.